A **HARTAYA SDN BHD & ORS**

v.

MALAYAN BANKING BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN JC
[SUIT NO: D-21-55-2009]
17 SEPTEMBER 2009

C ***CIVIL PROCEDURE:*** *Injunction - Interim injunction, application for - Injunction to restrain disposal of property under non-performing loans - Non-performing loans sold to non-licensed institution under sale and purchase agreement - Validity of agreement - Minister's approval obtained whether a condition precedent or a condition subsequent to agreement -*
D *Sale to non-licensed institution whether permitted under BAFIA provisions - Banking and Financial Institutions Act 1989 (BAFIA), ss. 49, 118, 126*

BANKING: *Banks and banking business - Non-performing loans - Sale to non-licensed institution - Whether sale permitted under BAFIA 1989*
E *provisions - Whether sale of banking business - Banking and Financial Institutions Act 1989 (BAFIA), ss. 49, 118, 126*

BANKING: *Banks and banking business - Non-performing loans - Sale to non-licensed institution - Approval of Minister obtained - Whether a condition precedent or a condition subsequent to agreement - Banking and*
F *Financial Institutions Act 1989 (BAFIA), ss. 49, 118, 126*

WORDS & PHRASES: *'agreement' and 'proposed agreement' - Meaning and interpretation under s. 49 (1)(b) and (2) Banking and Financial Institutions Act 1989*

G This was the plaintiffs' application for an interim injunction restraining the defendants from disposing of property under the plaintiffs' non-performing loans and the defendants' application to set aside the plaintiffs' *ex parte* injunction and the ad interim against
H them. The 1st defendant ('D1'), a licensed bank, sold non-performing loans to the 2nd defendant ('D2'), a non-licensed institution, pursuant to a sale and purchase agreement ('SPA') executed between the said parties. The SPA was subject to the approval of the Minister of Finance ('Minister') being obtained
I under s. 49(1)(b) of the Banking and Financial Institutions Act 1989 ('BAFIA'). The plaintiff contended that the approval of the Minister should have been obtained before the execution of the SPA and not after as was the case herein. Further, D1's sale of the non-

performing loans to D2 was not permitted by s. 49(9) BAFIA as D2 was a non-licensed institution. The main issue was whether the disposal of the non-performing loans to D2 being a non-licensed institution, was against the BAFIA provisions. A

Held (dismissing interim injunction application; allowing setting aside of *ex parte* injunction and ad interim injunction): B

(1) Upon a perusal of the entirety of the SPA, the parties intended to, and did enter into a conditional contract. The agreement expressly provided for a precedent condition, by which the agreement did not come into being or effect until the approval of the Minister had been obtained. (para 11) C

(2) Section 49 BAFIA imposed a precedent statutory condition, namely, that the validity of any agreement was subject to the approval of the Minister. A failure to procure such approval resulted in the agreement being void as the object of the agreement was forbidden by law as per s. 24(a) Contracts Act 1950. As such, compliance with s. 49(1) BAFIA, being a precedent statutory condition went to the formation of the agreement and not to its performance as contended by the plaintiffs. D1 and D2 could not therefore be regarded as having "entered" into an agreement for a sale under s. 49(1)(b) simply by reason of the execution of the SPA which in itself envisaged that the sale contemplated was conditional upon the approval of the Minister. (para 12) D E F

(3) Section 49(2) BAFIA made reference to a "proposed agreement" whilst s. 49(1)(b) used the word "agreement". The respective words, "agreement" and "proposed agreement" were not defined. It was therefore not expressly spelt out in BAFIA whether or not a conditional agreement such as the SPA could be entered into prior to the parties seeking the approval of the Minister. A logical conclusion would be that "agreement" referred to a concluded contract whilst a "proposed agreement" suggested a not concluded contract. The meaning to be attributed on a purposive approach would be that a conditional agreement could be regarded as a "proposed agreement" under s. 49 BAFIA. Section 49(7) fortified such an approach because it allowed the Minister on receipt of such an application to approve the same with or without any modifications, variations or conditions or to refuse the application. If the Minister could modify the terms as he saw fit, it followed that the SPA could not be regarded as a G H I

concluded and binding agreement. Accordingly, it could not be said that the parties had, by executing the SPA entered into an agreement within the meaning of s. 49 BAFIA. There was no contravention of s. 49(1)(b) BAFIA because there was no agreement for the sale of any part of the banking business of D1 as of the date of signing the conditional SPA. (paras 13 & 15)

(4) As for the Bank Negara Malaysia ('BNM') guidelines on the disposal/purchase of non-performing loans by banking institutions which also required the Minister's prior approval for the sale of a part of the banking business of a licensed institution, there was no contravention as the Minister's approval was obtained prior to the SPA coming into force as per cl. 3.6 of the same. The contention of illegality for contravention of s. 49(1)(b) BAFIA therefore failed. (para 16)

(5) Section 126 BAFIA was a provision enabling the Minister or BNM, to make regulations in respect of the conduct of the business of licensed institutions. In the instant case, those guidelines were used by D1, a licensed institution, to dispose of its non-performing loans to an unlicensed institution. There was nothing in s. 126 that prohibited the Minister from issuing guidelines which allowed for the disposal of assets of the bank to a third party other than a licensed institution. (paras 17 & 18)

(6) The matter being disposed of were the non-performing loans comprising assets of the licensed institutions and not the banking business *per se*. Those non-performing loans which were assets of the licensed institution were then realised by the purchasing third party. The collection of debts did not appear to fall within the definition of banking business. To that end, the unlicensed third party was not undertaking or conducting banking business. (para 19)

(7) The Minister had in fact given D1 and/or D2 an exemption from the application of s. 49(9) BAFIA pursuant to s. 118. Section 118 BAFIA empowered the Minister to preclude the operation of the BAFIA provisions (save for ss. 96 and 97). That would include the operation of s. 49(9)(a) which in turn related to s. 49(1)(b) (*ie*, the sale and disposal of the whole or a part of the banking business). The gazette notification under the Banking and Financial Institutions (Disposal of Non-performing Loans) Exemption Order 2007 expressly

allowed for the disposal of non-performing loans to non-licensed institutions. As the Minister enjoyed the express power under s. 118 BAFIA, it could not be said that the exemption order was invalid or *ultra vires* BAFIA as contended by the plaintiffs. That construction was further supported by s. 50(1) BAFIA which provided that an application to court to give effect to an agreement under s. 49(1)(b) or (c) BAFIA might be made by the "licensed" institution or "other person to whom the transfer was being made". It envisaged that a transfer of a part of the banking business might be made to a non-licensed institution. A similar reasoning would apply to the BNM guidelines issued pursuant to s. 126 and when read in conjunction with the exemption order made under s. 118, could not be said to be *ultra vires* BAFIA. (paras 20-27)

(8) Parliament intended to accord power to the Minister of Finance to exempt any person or category of persons from the provisions of BAFIA. A narrow interpretation would limit or restrict the powers accorded to the Minister expressly provided by statute. (para 28)

(9) The disposal of the non-performing loans, including the debts of the plaintiffs by D1 and D2 was legal and valid. As the consideration of illegality failed, there was no basis on which the interim injunction could remain. (para 31)

(10) The balance of convenience favoured the defendants. The instant suit was instituted long after the disposal of the plaintiffs' non-performing loans. It was only now that the receiver and manager proceeded to sell the secured property that the plaintiffs saw fit to apply to court on an *ex parte* basis to stop the sale. That did not appear to be *bona fide*. The balance of convenience clearly did not favour restraining the receiver and manager from realizing the charged assets. If the plaintiffs had quarrel with the receiver and manager as to the manner of disposal or alleged misconduct, they were adequately protected by the provisions of s. 192(2) Companies Act 1965. The undertaking as to damages was also in issue as the 1st plaintiff was financially insolvent, the 2nd plaintiff had a liability in excess of RM40 million and there was no evidence of the 2nd and 3rd plaintiffs' ability to pay damages. (paras 32 & 33)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC ***(refd)***

Bonsel Development Pte Ltd v. Tan Kong Kar [2000] 4 SLR 18 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Smallman v. Smallman [1972] Fam 25 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 49(1)(b), (c), (2), (7), (9)(a), 50(1), 96, 97, 118(1), 126

Companies Act 1965, s. 192(2)

Contracts Act 1950, s. 24(a), (b)

Interpretation Acts 1948 and 1967, s. 17A

For the plaintiffs - T Gunaseelan (Ahmad Amir with him); M/s Gunaseelan & Assoc

For the 1st defendant - S Ramesh; M/s Adnan Sundra & Low

For the 2nd defendant - J Kannaperan (Anis Hashim with him); M/s Shearn Delamore

For the 3rd defendant - Sunil Abraham; M/s Zul Rafique & Partners

For the 5th defendant - SL Ooi; M/s Ranjit Ooi & Robert Low

Reported by Usha Thiagarajah

JUDGMENT

Nallini Pathmanathan JC:

[1] The plaintiffs in this suit initiated this action against the defendants, contending essentially that the sale of non-performing loans ('assets') by Malayan Banking Berhad, ('D1') a licensed bank, to one Gale Force Sdn. Bhd. ('D2'), a non-licensed institution *vide* a Sale and Purchase Agreement dated 17 January 2007 is null and void as it contravenes the provisions of BAFIA. Additionally the plaintiffs seek a declaration that the BNM Guidelines dated 28 December 2006 are also contrary to the provisions of BAFIA and that accordingly the Minister's Exemption Order is similarly null and void.

[2] In conjunction with the filing of the suit, the plaintiffs applied for and obtained an *ex parte* injunction dated 14 August 2009 restraining Gale Force and the Receiver and Manager of the 1st plaintiff from disposing of a partially completed 238 room resort hotel known as "Strawberry Kijal", nine vacant parcels of land and 22 Apartment units in Kemaman. After the requisite 21 days had lapsed, an ad interim injunction continues, pending the outcome of the applications set out below.

[3] Enclosures 4, 12 and 15 came before me for disposal. Enclosure 4 is the plaintiffs' application for an interim injunction, while encls. 12 and 15 are applications by D2 and the Receiver and Manager, Ong Hock An ('D5') respectively, to set aside the *ex parte* injunction and the ad interim injunction.

[4] The issues:

(i) The plaintiffs contend that the Sale and Purchase Agreement dated 17 January 2007 is null and void because it contravenes s. 49(1)(b) of BAFIA. The said section provides, *inter alia* as follows:

> ... (1) No person shall enter into an agreement or arrangement:
>
> (a) ...
>
> (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;
>
> (c) ...
>
> (d) ...
>
> Unless:
>
> (A) The proposed agreement or arrangement is in writing; and
>
> (B) All the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.
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> (2) An application under subsection (1) shall be made by submitting it to the Bank together with a copy of the proposed agreement or arrangement and all other information and documents as may be related directly or indirectly to the agreement or arrangement or relevant to its consideration.

[5] In the instant case, the plaintiff contends that although the Sale and Purchase Agreement is dated 17 January 2007 the approval of the Minister of Finance ('D4') was not obtained before the execution of the sale and purchase agreement. Such approval was obtained subsequently.

[6] D2 and the other defendants contend in reply to this that although the Sale and Purchase Agreement was executed on 17 January 2007 it was a conditional agreement for the sale of the

non-performing loans. They maintain that it was a condition precedent to the formation of the contract or agreement that the approval of the Minister be procured. In other words, they maintain that if the condition precedent had not been fulfilled, no agreement would come into being. As such at the time of execution of the Agreement, no agreement was in place as the condition precedent was not fulfilled, (see *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 per Salleh Abas CJ (Malaya):

> ... It is, however a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRIL v. Danubian Trading Co Ltd.* [1952] 2 KB 297 at 304 per Denning LJ and *Property and Bloodstock Ltd v. Emerton; Bush v. Property and Blood Stock Ltd* [1967] 3 AER 321 at 330 per Sachs LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

[7] As applied and followed in *Ideal City Development Sdn. Bhd. v. Dynamic Mould Sdn. Bhd.* [2003] 3 CLJ 201 and *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] 1 LNS 3.

[8] The plaintiffs however contend that the entire purport of the agreement is such that the condition relating to the approval of the Minister amounts to a condition precedent to the performance of the obligations under the contract. In other words, the plaintiffs maintain that a binding agreement came into being as of 17 January 2007, the performance of which was postponed until the fulfilment of the specified condition, (see *Bonsel Development Pte Ltd v. Tan Kong Kar* [2000] 4 SLR 18 and *Smallman v. Smallman* [1972] Fam 25 where Lord Denning said on the facts of that case:

> ... in my opinion, if the parties have reached an agreement on all essential matters, then the clause "subject the approval of the court" does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves it is binding on the parties. If the court does not approve it is not binding. But pending the application to the court, it remains a binding agreement which neither party can disavow ...

[9] In the instant case, the recitals, more particularly at F and G specify that the seller, ie, D1 has conditionally, and subject to the approval of the Minister, D4, accepted the offer made by D2; and that subject to MOF approval the Seller will sell and the Buyer will buy the Loans together with all Associated Loan Documents. These two recitals read in isolation appear to fall into the latter category, ie, a condition precedent to the performance of obligations under the contract, rather than to the coming into being of a contract. However cl. 3.1 is termed "condition Precedent" and provides as follows:

> The sale and purchase of the Assets shall be conditional upon the Parties obtaining MOF Approval within a period of 90 days from the date here of or such extended time as may be agreed ...

[10] Clause 3.5 of the Sale and Purchase agreement provides that on the non-fulfillment of the condition precedent the Buyer is entitled to a return of the deposit placed with the seller and after this the agreement shall be of no further effect. Finally cl. 3.6 provides that the Agreement shall become unconditional and effective upon MOF Approval being given etc. This last clause by providing for an effective date provides that the agreement does not become effective until such approval is accorded by the Minister.

[11] Therefore upon a perusal of the entirety of the Agreement, it appears that the parties intended to, and did enter into a conditional contract. The agreement provides for a condition precedent expressly, by which the agreement did not come into being or effect until the approval of the Minister had been obtained. It falls into the former category of cases, as per *National Land Finance v. Sharidal* (above), rather than *Bonsel*'s case (above). Although the Recitals to the Agreement might well suggest that the Agreement falls into the latter category, a perusal of the entirety of the Agreement particularly cl. 3 in its entirety shows otherwise.

[12] Secondly s. 49 of BAFIA imposes a statutory condition precedent, namely the approval of the Minister of Finance before any agreement pursuant to s. 49 becomes valid. A failure to procure such approval results in the agreement being void as the object of the agreement is forbidden by law as provided in s. 24(a) of the Contracts Act 1950. As such, as submitted by learned counsel for D5, compliance with s. 49(1) of BAFIA being a statutory condition precedent goes to the formation of the agreement and not to the performance of it as contended by the plaintiffs. D1 and D2 cannot therefore be regarded as having "entered" into an agreement for a

A sale under s. 49(1)(b) simply by reason of the execution of the Sale and Purchase Agreement which in itself envisages that the sale contemplated is conditional upon the approval of the Minister of Finance.

B **[13]** Section 49(2) of BAFIA makes reference to a 'proposed agreement' by providing that in order to dispose or transfer assets of a licensed institution, the parties must first apply to the Minister by sending a proposed agreement and the relevant information to enable the Minister to make a decision. In s. 49(1)(b) the word C used is 'agreement'. The respective words, 'agreement' and 'proposed agreement' are not defined. It is therefore not expressly spelt out in BAFIA whether or not a conditional agreement such as the subject Sale and Purchase agreement can be entered into prior to the parties seeking the approval of the Minister. A logical D conclusion would be that 'agreement' refers to a concluded contract whilst proposed agreement suggests an unconcluded contract. In attempting to determine the meaning to be attributed, a purposive approach ought to be adopted, (see s. 17A Interpretation Act). Bearing in mind that a conditional agreement does not take effect E unless the condition precedent is fulfilled such an agreement can be regarded as a 'proposed agreement' under s. 49 of BAFIA. Section 49(7) fortifies such an approach because it allows the Minister on receipt of such an application to approve the same with or without any modifications, variations or conditions or to refuse the F application. If the Minister can modify the terms as he sees fit, it follows that the Sale and Purchases Agreement dated 17 January 2007 cannot be regarded as a concluded and binding agreement. Accordingly it cannot be said that the parties had, by executing that agreement, entered into an agreement within the meaning of G s. 49 of BAFIA.

[14] For these reasons I conclude that:

(i) No binding agreement came into being on 17 January 2007 when the conditional contract was signed;

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(ii) The agreement only became effective upon the approval of the Minister being obtained;

(iii) As such there was no contract in existence for the sale of a part of the banking business of D1 until the approval of the I Minister was obtained;

(iv) The plaintiffs' contention that an agreement was entered into prior to the approval of the Minister being obtained is not tenable because by reason of the matters above, no agreement came into being until the consent of the Minister was obtained.

[15] As such there appears to be no contravention of s. 49(1)(b) because there was no agreement for the sale of any part of the banking business of D1 as of 17 January 2007.

[16] As for the Bank Negara Guidelines on the Disposal/Purchase of Non-Performing Loans by Banking Institutions ('BNM Guidelines')at Part 3, 3.3 which also makes reference to the need for prior approval of the Minister for the sale of a part of the banking business of a licensed institution, there does not appear to be a contravention of the same because the approval of the Minister was obtained prior to the agreement coming into force as expressly provided in cl. 3.6 of the Sale and Purchase Agreement. The contention of illegality for contravention of s. 49(1)(b) therefore fails.

[17] The next issue raised is that the Guidelines which were issued under s. 126 of BAFIA are *ultra vires* BAFIA. Section 126 reads:

> ... The Bank or the Minister may generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of the conduct of all or any of the licenced or scheduled businesses, issue such guidelines, circulars or notes as the Bank or the Minister may consider desirable.

[18] As such it is contended the Guidelines cannot contravene the very provision in respect of which the Guidelines were made. It is evident from a reading of s. 126 that it is a provision enabling the Minister or BNM to make regulations in respect of the conduct of the business of licensed institutions. In the instant case those guidelines were used by a licensed institution, namely D1 to dispose of its non-performing loans to an unlicensed institution. There is nothing in s. 126 that prohibits the Minister from issuing guidelines which allow for the disposal of assets of the bank to a third party other than a licensed institution.

[19] It is contended that the Guidelines are not in keeping with the general tenor of the Act which envisages that no-one should carry on the business of banking, save for a licensed institution. *Ultra vires* is raised in that context. One answer to this is that what is being disposed of are the non-performing loans comprising assets

of the licensed institutions and not the banking business *per se*. These non-performing loans which are assets of the licensed institution are then realized by the purchasing third party. The collection of debts does not appear to fall within the definition of banking business. To this end, when viewed in totality the unlicensed third party is not undertaking or conducting banking business.

[20] Even if I am wrong in so concluding it is relevant that the Minister has given D1 and/or D2 an exemption pursuant to s. 118(1) of BAFIA. Section 118 provides:

> (1) The Minister may, on the recommendation of the Bank:
>
> (a) In consideration of the special circumstances relating to the constituent documents of any particular person, or any class, category or description of persons, and the nature of the business carried on by such particular person, or by such class, category or description of persons; and
>
> (b) If he is satisfied that it would not be:
>
> (i) Prejudicial to the promotion of a sound financial structure in Malaysia; and
>
> (ii) Contrary to the public interest to do so,
>
> By order published in the Gazette exempt such particular person, or such class, category or description of persons, from all or any of the provisions of this Act.

[21] The Gazette notification stipulates that the Minister exempts a licensed institution from the application of s. 49(9)(a) of the Act in relation to the disposal of non-performing loans by a licensed institution to an institution not licensed under the Act, provided that such disposal is made in accordance with the requirements set out in the Guidelines.

[22] Section 49(9)(a) provides *inter alia*, that an application under subsection (1)(b) (ie, the sale or disposal of the whole or a part of the banking business) shall not be recommended by the bank and shall not be approved by the Minister where the agreement would result in the sale or disposal of the business or any part of the business to an unlicensed institution.

[23] By reason of the Exemption therefore, it follows that the Minister has expressly allowed a licenced institution to dispose of its non-performing loans to a non-licensed entity. And he is empowered so to do by s. 118.

[24] However the plaintiffs challenge this by stating that both the Exemption and the BNM Guidelines contravene, or are *ultra vires* BAFIA and particularly s. 49(1)(b) because the Guidelines allow the sale or disposal of the banking business to non-licensed institutions, which is expressly precluded by s. 49(9)(a).

[25] Dealing first with the Exemption Order, it was issued pursuant to s. 118 of BAFIA which allows the Minister to exempt a person or category or class of persons from all or any part of the provisions of the Act. In short the Minister is empowered to preclude the operation of the provisions of BAFIA (save for ss. 96 and 97) in respect of any person or class or category of persons. In this context the Gazette Notification under the Banking and Financial Institutions (Disposal of Non-Performing Loans) Exemption Order 2007 expressly allows for the disposal of NPLs to non-licensed institutions. By virtue of s. 118, the Minister can validly alleviate the operation of any section of BAFIA in relation to any person or category of persons. This would include the operation of s. 49(9)(a) which relates in turn to s. 49(1)(b). As the Minister enjoys this express power under s. 118, it cannot be said that the Exemption Order is invalid or *ultra vires* BAFIA as contended by the plaintiffs.

[26] This construction is further supported by s. 50(1) of BAFIA which provides that an application to court to give effect to an agreement under s. 49(1)(b) or (c) of BAFIA may be made by "the licensed" institution or "other person to whom the transfer is being made". It envisages that a transfer of a part of the banking business may be made to a non-licensed institution.

[27] A similar reasoning would apply to the BNM Guidelines which were issued pursuant to s. 126, and when read in conjunction with the Exemption Order made under s. 118, cannot be said to be *ultra vires* BAFIA.

[28] Finally it is contended by D2, and I agree with the submission of learned counsel, that even if there is a conflict between ss. 118 and s. 49(9)(a) of BAFIA, the interpretation to be adopted by this court should be a purposive interpretation which would promote the purpose or objective of the Act. Adopting such

an approach it appears that Parliament intended to accord power to the Minister of Finance to exempt any person or category of persons from the provisions of BAFIA. To interpret the section more narrowly would be to limit or restrict the powers accorded to the Minister by clear and express words in the statute.

[29] In summary there does not appear to this court to be a contravention of s. 49(1)(b) of BAFIA. Neither do the BNM Guidelines issued pursuant to s. 126 or the Exemption Order issued pursuant to s. 118 appear to be *ultra vires* BAFIA. The contention of illegality therefore fails. I am further fortified in my conclusion by the decision of the High Court in *Rock Corporation v. Malayan Banking Berhad & 1 Other* where a similar challenge was mounted and dismissed. The High Court held that the non-performing loans were capable of being transferred to a non-licensed financial institution pursuant to the Exemption Order.

[30] I have attempted to consider this issue of illegality in some detail notwithstanding that this is an application for an interim injunction which normally would allow for a more cursory view as to whether or not a serious issue to be tried arises. This has been necessary because the contention of illegality, which is essentially a question of law, has the effect of effectively determining this matter exhaustively. This is because the determination of whether or not the disposal of non-performing loans by a licensed institution to a non-licensed institution is illegal as it is not permitted under BAFIA is the sole question in this suit. It was not possible to simply state that the issue of illegality appears to be a serious issue and not proceed further. If I had done so, it would then leave open the possibility of illegality which could not be condoned. If indeed I had concluded that such disposal was tainted by illegality or was *ultra vires* BAFIA, the result would be that all action taken thereafter would be rendered null and void and would have to cease. This would include any action taken by the Receiver and Manager, D5, as his appointment would be in issue. In those circumstances it would follow that any attempt to sell charged property by D5 would also have to be stopped. As such the other factors that would normally come into play in determining whether or not an interim injunction ought to be granted, are of less relevance than normal on the unique approach taken in this case. It is simply a matter of whether the disposal of the non-performing loans including that relating to the plaintiffs, is null and void by reason of illegality.

[31] As such it was necessary to determine whether the consideration of illegality held basis or was tenable. Having considered the matter at some length, it appears to me to lack basis. The disposal of the non-performing loans, including the debt/s of the plaintiffs by D1 to D2 is legal and valid. As such there remains no basis on which the interim injunction can remain.

[32] In any event, the further factors that favour a dissolution of the interim injunction are that the balance of convenience favours the defendants. This suit was instituted long after the disposal of the plaintiffs' non-performing loan to D2, some two years ago. It is only now that the Receiver and Manager, D5 is proceeding to effect a sale of secured property that the plaintiffs have seen fit to apply to court, and that too on an *ex parte* basis, to stop the sale. This does not appear to be *bona fide*. The balance of convenience clearly does not favour restraining the Receiver and Manager from realizing charged assets. If the plaintiffs have a quarrel with the Receiver and Manager as to the manner of disposal or alleged misconduct, they are adequately protected by the provisions of s. 192(2) of the Companies Act 1965.

[33] Finally the undertaking as to damages is in issue as the 1st plaintiff is financially insolvent, the 2nd plaintiff has a liability in excess of RM40 million and as there is no evidence of the 2nd or 3rd plaintiffs' ability to pay damages.

[34] I concluded that there was no tenable basis on which the interim injunction should continue and therefore dissolved the ad interim injunction. Enclosure 4 is dismissed and encls. 12 and 15 are allowed. As for costs, RM12,000 is payable by the plaintiffs to D12 and D5 within one month of the date of this Order.